

Members

Rep. David Orentlicher, Chairperson  
Rep. Scott Pelath  
Rep. Vernon Smith  
Rep. Jonathan Elrod  
Rep. Ralph Foley  
Rep. Amos Thomas  
Sen. Richard Bray, Vice-Chairperson  
Sen. Brent Steele  
Sen. Brent Waltz  
Sen. Karen Tallian  
Sen. John Broden  
Sen. Earline Rogers



## **BOWSER COMMISSION**

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### **MEETING MINUTES<sup>1</sup>**

**Meeting Date:** October 16, 2007  
**Meeting Time:** 9:30 A.M.  
**Meeting Place:** State House, 200 W. Washington St.,  
Room 233  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 3

**Members Present:** Rep. David Orentlicher, Chairperson; Rep. Scott Pelath; Rep. Ralph Foley; Rep. Amos Thomas; Sen. Richard Bray, Vice-Chairperson; Sen. Brent Waltz; Sen. Karen Tallian; Sen. Earline Rogers.

**Members Absent:** Rep. Vernon Smith; Rep. Jonathan Elrod; Sen. Brent Steele; Sen. John Broden.

Rep. Orentlicher convened the meeting at 9:35 a.m.

As the first order of business, the Commission members reviewed and approved the minutes from the September 24<sup>th</sup> meeting.

Rep. Orentlicher recognized David Crane, M.D., to speak on the topic of the death penalty and mentally ill defendants.

Dr. Crane described his background in medicine, psychiatry, and law and his experience as a forensic psychiatrist over the past 40 years.

He told the Commission members that the difficulty with psychiatry is that it involves an element of individual judgment that is not required in evaluating other medical conditions. Consequently, the outcome of judgments will vary much more significantly when assessing psychiatric conditions as compared to other types of medical conditions.

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<sup>1</sup> Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

The criteria used by the Diagnostic Statistical Manual (DSM) to identify a psychiatric disorder changes over time, so it can be difficult to identify what type of disorder a defendant might have. As an example, until 1973 the DSM labeled homosexuality as a mental illness.

He related how he and the late Larry Davis, a forensic psychiatrist and contemporary, disagreed on a number of cases.

He told the members about a woman who killed the former mayor of Evansville. He indicated that although she was mentally ill, she had the defense mechanism to cover up the murder by instructing her mother to tell police that she was watering their garden at the time of the murder. He said even though he was the only one of five psychiatrists who thought that the defendant was culpable, the jury convicted the woman

He suggested that juries rather than a judge should determine whether a defendant is mentally ill because of the difficulty with one person making such a decision.

He stated that if three psychiatrists agreed unanimously on a mental illness diagnosis during a pretrial hearing that in all likelihood a defendant is mentally ill. He indicated that when a unanimous decision cannot be reached, then it is difficult to prove someone is mentally ill.

He concluded by stating that, when using the DSM IV manual, “buyer beware”.

Rep. Orentlicher recognized Michael Jenuwine, Ph.D., J.D., to speak on the matter.

Dr. Jenuwine told the Commission members that as a practicing attorney and psychologist he has observed a large number of people who fall through the cracks because they have been diagnosed incorrectly.

He indicated that the DSM IV should not be considered a “bible” as much as a “Sears catalogue” of mental illnesses and problems. He said that many perceptions concerning mental illness have changed since the manual was first published in 1952. He said that the DSM is a moving target, so if the General Assembly refers to the manual in statute, it may need to be monitored and occasionally updated to ensure that the reference in the manual corresponds to the condition described in statute.

He agreed with Dr. Crane that the DSM provides a common language for mental health professionals to use when referring patients for certain types of care. He also said the DSM terms are often used for insurance billing

He told the Commission that the draft proposal was right to focus on disorders identified in the DSM as Axis I disorders because they are typically the most severe, but he noted that some individuals with Axis II disorders can also suffer the sorts of “active symptoms” referenced in the proposal. He noted that among criminal defendants he has evaluated, those who were likely to fall within the definitional language of the proposal most often had both Axis I and Axis II disorders, and that many suffered from undiagnosed and untreated disorders that they “self-medicated” with alcohol and drugs.

He told the Commission that they also might wish to consider the effects of organic causes, such as brain tumors and how they might also affect behavior.

He recommended that the Commission not tie themselves down to the language within the DSM because the DSM’s definitions change over time.

He described alternatives to referring to the DSM for lawmaking purposes. These included

citing best practices that the General Assembly could refer to in statute when determining if someone is competent to stand trial.

He described how psychologists and psychiatrists use a variety of psychological tests to determine a person's competence to stand trial. He indicated that these tests are normalized against various subgroups, so that psychologists and psychiatrists can compare the results of tests that the person completed under study with the accumulated results of different sample populations, including criminal and noncriminal and mentally ill and normal populations. A psychologist looks for responses that are consistent with the populations of these subgroups.

He said that assessing an individual's mental status at the time of the crime can be difficult when the assessment is made months or even years later, but that it was not impossible because, in addition to testing, psychiatrists and psychologists look at descriptions of an individual's behavior at the time of the crime, and that an individual would have had to "fake" mental illness for the entire period, not just on testing.

He also said that psychologists and psychiatrists can determine when an individual is "faking" during testing, by comparing test results to those of similar subgroups, as described above, looking for patterns throughout the tests as opposed to focusing on individual answers. He also said that a battery of tests can be administered, and that it is difficult to "fake" every test, because they are very different.

Rep. Foley asked whether a jury or judge should determine whether a defendant is mentally ill. Dr. Jenuwine indicated that judges should decide because juries lack the training to understand the testimony presented.

Glenn Tebbe, representing the Indiana Catholic Conference, thanked the Commission for studying this issue and reminded the members that exempting a mentally ill defendant in a capital crime from the death penalty is not absolving the person of the crime. Only taking away execution as a punishment is being proposed.

### **Discussion of Bill Draft**

During the discussion of the proposed bill draft<sup>2</sup>, Rep. Orentlicher told the Commission that the goal of this draft is to keep the range of mental illness that is to be exempt from the death penalty fairly narrow. Legislation that identifies specific disorders as eligible for death penalty exemption would allow the statute to stay narrow and yet allow the statute to become more inclusive in the future if members of the General Assembly wished.

Rep. Thomas indicated that because identifying mental illness is so subjective, he could not support this proposal. Sen. Waltz indicated this proposed exemption would effectively eliminate the death penalty in Indiana. He objected to the use of mental health professionals as a "professional jury". He told the members that such a definition is so broad that anybody could fall into these categories and noted that a significant number of death penalty defendants do fall into these categories.

Sen. Tallian indicated that referring to a battery of tests and credentials is probably good practice, but it would be difficult to put these references in statute because the tests change over time. Rep. Orentlicher cited changes in the state's autopsy law as an example of how references to best practices could be made in statute.

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<sup>2</sup> (see <http://www.in.gov/legislative/interim/committee/prelim/BCOM01.pdf> )

Rep. Pelath indicated that the unavoidable question is whether the death penalty still has merit. He said that he was concerned that if the courts err on the side of the death penalty, then we will be making some mistakes.

Sen. Tallian indicated that the courts frequently use expert witnesses to assess problems and using experts as advisors is not the same as a professional jury. As an example, the courts use expert witnesses extensively in medical malpractice cases. The General Assembly would be asking experts to be advisors in these types of cases which is done frequently in technical cases.

Rep. Foley reminded the Commission members that assessing the state of the defendant's mental condition is already part of the process of determining whether the presence of mental illness should exempt a person from death, even if this bill is not enacted.

Sen. Bray was concerned that the defense would get two chances to raise mental illness. He does not want to make these exemptions so broad that they infringe on the jury's discretion.

Rep. Orentlicher noted the differences in views among the members and announced that a final meeting would be held at a time to be announced.

The meeting was adjourned at 11:30 a.m.